IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 952 of 1986

with

CIVIL APPLICATION No 8929 of 1996

and

First Appeal No. 1359 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KAMALDEEP CO OPERATIVE HOUSING SOCIETY LTD.

Versus

KAMALDEEP CORPORATION

Appearance:

1. First Appeal No. 952 of 1986

MR VS PARIKH for appellant

MR MAHESH R SHAH for Respondent No. 1

MR PH PARMAR, PARTY-IN-PERSON for Respondent No.5 and power of attorney holder of respondent No.2.

3. First Appeal No. 1359 of 1986.

MR PH PARMAR, PARTY IN PERSON for appellants

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.M.KAPADIA
Date of decision: 04/05/98
COMMON C.A.V. JUDGEMENT (Per A.M. Kapadia, J.)

1. Judgment and decree dated 30.12.1985 recorded in Civil Suit No. 2404 of 1974, by the City Civil Court, Ahmedabad, whereby the learned trial Judge has dismissed the said suit as well as cross-objections filed by the plaintiff an defendants respectively, is in challenge before us in these two appeals.

2. The suit in question was filed by the plaintiff Kamaldeep Cooperative Housing Society Limited, against Kamaldeep Corporation and others for recovery of an amount of Rs.89,630.45 with running interest and costs on the ground of incomplete and defective work of flats of the society constructed by the defendants and also for declaration against defendant No.5, Architect, to the effect that certificates issued by him were not legal and valid and were not binding to the plaintiff society.

3. As against the suit of the plaintiff, defendants filed cross-objections for recovery of an amount of Rs.1,40,251/-; Rs.1,19,251.00 being the balance value of the flats and Rs.21,000.00 being the value of extra work; alongwith interest of Rs.45,780/- towards the flats constructed by the defendants.

4. The trial Judge, as observed hereinabove, has dismissed the suit as well as cross-objection, which has given rise to both these appeals preferred by the plaintiff and defendants respectively by invoking the aids of provisions of Section 96 of the Code of Civil Procedure, 1908 ('the Code' for short hereinafter). First Appeal No. 952 of 1986 is preferred by the original plaintiff, Kamaldeep Cooperative Housing Society Limited while First Appeal No. 1359 of 1986 is preferred by the defendant M/s. Kamaldeep Corporation and, therefore, for the sake of convenience and brevity, the parties are hereinafter referred to as the 'plaintiff' and the 'defendants' in this judgment.

5. Before highlighting the controversy which is raised for our determination in these appeals, it is necessary to give a resume of material facts of the case of the plaintiff as well as the defendants succinctly.

6. The plaintiff was a registered society under the relevant provisions of the Gujarat Cooperative Societies Act while defendant No.1 was a partnership firm carrying

on business of construction and defendants No.2, 3 and 4 were the partners thereof. Defendant No.1 sponsored a scheme and had given an advertisement inviting the public to join that scheme. As per the advertisement, members of the plaintiff society approached the defendant No.1 and in pursuance of the same, defendant No.1 enrolled members of the plaintiff society in the said scheme and then the society was registered with the enrolled members. Defendant No.5, who is the son of defendant No.2, was doing the work of architect and for the construction of the flats of the plaintiff society, defendant No.1 had obtained contract of the plaintiff society. As per the agreed terms and conditions of the contract each member was to be provided with flat admeasuring an area of 175 sq.yd. on South Wing Blocks and other detached flats on North, East and West admeasuring 131 sq.yds. Each member had to pay lump sum of Rs.33,501 for flat on South wing and Rs.19,001 for North, East and West wings respectively. Defendant No.1 had to arrange for loans for the remaining amount. According to the plaintiff, the construction which was carried out by defendant No.1 was less in measurement, incomplete and defective as well. Besides this, defendant No.1 had also not used material of standard quality. Therefore, plaintiff repeatedly requested defendant No.1 to complete the incomplete work and to remove the defects and not to use material of inferior quality. Despite this, defendants did not pay any heed to the request of the plaintiff. As a result of the same, plaintiff ultimately, as a last resort, served a notice dated 28.9.1972 to the defendants to complete the construction as per the agreed terms and conditions of the contract and possession of flats was also sought for. In the said notice, it was also stated that in case of non - compliance by the defendants, the plaintiff would carry out the work at the cost and risk of the defendant No.1 and an amount of Rs.5,000 would be retained as per the estimate and the certificate of defendant No.1. It was averred that, defendant No.5 who happened to be the architect- being the son of defendant No.1 - in collusion with the contractor, gave false completion certificates. As defendant No.1 did not carry out the defects, the plaintiff had carried out the said work at the cost and risk of the defendant No.1. It was also averred that defendant No.1 had also collected some amount directly from the members for which no account was given to the plaintiff society and/or to its members. Therefore, the plaintiff society was obliged to spent Rs.64,630.45 for rectifying the defects and for completing the incomplete work. It was averred that for remaining incomplete work amount of Rs.25,000 more was estimated. Therefore, the

plaintiff society was obliged to file the suit to recover Rs.89,630.45 with running interest and cost thereon from the defendants. Decree was also sought for against the defendant No.5 declaring that the certificates issued by him were not legal and valid and were not in accordance with law.

7. The suit was resisted by the defendants by filing separate written statements.

(i) Defendant No.1 and 2 filed joint written statement and also preferred counter claim. It was, inter alia, contended that there was an arbitration agreement between the parties. The matter should be referred to the arbitrator and, therefore, the Court has no jurisdiction. It was also pleaded that the plaintiff and defendants No.3 and 4 are in collusion with each other to jeopardies the interest of defendants No.1 and 2. The claim of the plaintiff was denied by the defendants No.1 and 2 and the plaintiff was put to the strict proof of the claim preferred by it. It was contended that the suit was barred by estoppel and waiver. It was also contended that the defendant No.1 firm was dissolved on 3.5.1971 and, therefore, the defendant No.2 has become sole proprietor thereof and this fact was within the knowledge of the plaintiff society. It was further pleaded that as per agrement dated 23.4.1967 plaintiff society had agreed to pay Rs.28,750 for A Type flats and Rs.37,950 for B Type flats. That the factum of execution of the agreement by the plaintiff was also denied as changes in the original plans were made as per the willingness of the plaintiff. The plaintiff society knew from the very beginning that the defendant No.5 is the son and power of attorney holder of defendant No.2 and collusion between defendants No.2 and 5 was denied in toto. Defendant No.1 had completed the work of the plaintiff society as per the agreement between the plaintiff and defendant No.1. It was also denied that the defendant No.1 carried out work on lesser area. It was also denied that the defendant No.1 had used goods of inferior and sub-standard quality. It was averred that there was always checking over the construction by the members directly and also by the structural engineer and the office bearers of the society. On 20.2.1973 after checking the work and having found the work satisfactory the plaintiff has taken the possession of the flats. It was also stated by the replying defendants that minor work which was incomplete at the time of taking over possession was also completed subsequently. It was denied that defendant No.5 had

committed breach of trust of the society by issuing false certificates. It was also averred by the replying defendants that during the progress of the work, neither the plaintiff nor any member on their behalf had raised any objection with regard to the quality of the goods and the work. It was also denied that the defendant No.1 had collected money from the members of the society and the account thereof was not given. Defendants had never collected any amount without giving any account or receipts. It was further averred that whatever amount was received from the members that was for the extra work and the account for the same was also given to them. It was also pleaded by the replying defendants that on 15.2.1975 the defendants called upon the plaintiff and defendants No.3 and 4 to refer the dispute to the arbitrator and the same was not complied with and, therefore, the defendants No.1 and 2 were obliged to file Special Civil Suit No. 3686 of 1975 under the provisions of section 20 of the Arbitration Act, 1940. The said suit was dismissed which had given rise to the First Appeal No. 1477 of 1983 before this Court which is still pending for final hearing. It was further submitted that the plaintiff society did not allow the defendants to prepare extra bill for extra work nor allowed to take measurement and, therefore, the accounts between them were yet to be finalized. It was specifically pleaded that the plaintiff had not made payment as per the certificates issued at the time of taking over the possession. Therefore, defendants had claimed the following amounts by way of counter claim:

Rs.1,19,251.00 being balance value of the flats.
Rs. 21,000.00 being value of the extra work

Rs.1,40,251.00 in all

It was averred that the above amount was due from the plaintiff to the defendants with interest of Rs.45,780.00. The plaintiff and defendants could not settle the accounts inter-se which had given rise to the aforesaid counter claim. In substance, the averments made in the suit by the plaintiff were denied in toto by the replying defendants and prayed for dismissal of the suit and also prayed that the counter claim preferred by defendants No.1 and 2 be allowed.

(ii) Defendants No.3 and 4 had also contested the suit by filing their joint written statement, inter alia, contending that the suit was not maintainable against them and the same was barred by limitation, acquiescence, delay and laches. It was also denied that the defendant

No.1 was a partnership firm. The replying defendants were not liable for any amount to the plaintiff if at all the claim was proved. It was also denied that the defendant No.1 had obtained work of the society on any condition. It was averred that the society was formed by the members themselves and the members as a body corporate got the society registered and got necessary registration, and this was within the specific knowledge of the society. Defendant No.5 is the son of defendant No.2 and this fact was within the specific knowledge of the plaintiff society. It was also denied that defendant No.5 was in collusion with the defendant No.1. The averments about the defective or incomplete work carried out by defendants and also about the use of sub-standard and inferior quality of material for the construction, were also denied. It was also averred that the plaintiff had retained Rs.5,000 of the contractor without any justifiable reason. Averment about the issuance of false certificates by defendant No.5 was also denied. It was also denied that the plaintiff society spent Rs.64,630.35 for the incomplete and defective work. It was averred that the defendants No.3 and 4 were dummy partners and had retired and the said fact was within the knowledge of the plaintiff and, therefore, ultimately they prayed for dismissal of the suit.

(iii) Similarly, defendant No.5 had also contested the suit by filing written statement, inter alia, contending that the suit was not maintainable and he was not a necessary party. It was also averred that the suit ought to have been filed before the Registrar of Nominees under the Gujarat Cooperative Societies Act. It was averred that Civil Court had no jurisdiction to try and decide the suit. Allegation with regard to the defective and incomplete work was also denied. Allegation with regard to the use of inferior and sub-standard goods was also denied. It was specifically averred that the plaintiff had not made payment as per the final certificates. It was also pleaded that the extra work suggested by individual member of the society was also done by the contractor and account had been directly settled with the members by the contractor. It was also denied that the plaintiff had to spent any amount for the incomplete and defective work. Ultimately, it was prayed for the dismissal of the suit with costs.

8. The plaintiff had also filed the written statement against the counter claim preferred by defendants No.1 and 2 , inter alia, raising contention that the counter claim was not maintainable and barred by limitation. It was denied that an amount of Rs.1,19,251

was due and outstanding. It was also denied that Rs.21,000 remained outstanding for the extra work. The facts referred to for the price of the flats were also denied. It was also denied that as per the agreement, total price of flats was Rs.11,66,100. It was alleged that after the booklet was published an agreement as to the price of flats was entered into by plaintiff and the defendants No.1 and 2 on 23.4.1967 and thereafter another agreement was also entered into on 27.10.1967 with respect to the construction. It was alleged that as per the final agreement, the price of A type flats and B type flats was different. So far as the price of B type flats was concerned, it was Rs.57,501 and out of the same each member was required to pay Rs.32,501 and balance of Rs.25,000 was to be arranged by defendant No.1 by way of loan to each member. Similarly, the price of A type flat was fixed at Rs.43,100 out of which each member was required to invest Rs.18,100 and balance amount of Rs.25,000 was to be arranged by the contractor for each member as loan. It was also pleaded that it was agreed to construct four semi flats. Two semi-type flats were equal to one A type flat and the price of such flat was 1/2 of A type . For the semi-type of flat the price was fixed at Rs.20,875 and out of which Rs.9,126 were to be paid by each member and the remaining amount of Rs.12,500 were to be obtained by way of loan for the members by the defendant No.1. It was specifically pleaded that total value of B type flat was Rs.4,68,008, total value of A type flat was Rs.12,32,028 and total value of four semi type flats the price was Rs.88,504 and in all the total value of the flats, was Rs.17,88,540. Out of the said amount Rs.76,000 were paid to the financial corporation towards share contribution and Rs.10,040 was paid being share contribution and membership contribution for 40 members and balance was Rs.17,02,500. It was also contended that giving credit of the amount paid for the land the balance was required to be paid by the plaintiff to the defendant No.1. The plaintiff had paid Rs.6,46,849 towards the price of the land and giving credit thereof an amount of Rs.10,56,060 remained to be paid for the construction charges. Rs.10,46,849 were paid to the defendants No.1 and 2 and, therefore, balance of Rs.9,211 was the outstanding amount. The said amount was adjusted towards Rs.4,200/-, the price of one cupboard which was not constructed by the defendant No.1, and agreed by defendant No.1 and Rs.5,011 was kept by the society as retention money. Therefore, it was averred that there remained nothing due from the plaintiff to the defendants. It was averred that the counter claim was barred by limitation and it was prayed that the counter claim be dismissed with cost.

9. On the pleadings of the parties, the learned trial Judge framed as many as 19 issues. Before the trial Court, on behalf of the plaintiff, 22 witnesses were examined. On behalf of defendants No.1 and 2, P.H. Parmar, defendant No.5, constituted power of attorney of defendants No.1 and 2, had entered into the witness box and his evidence was recorded while on behalf of the defendants No.3 and 4, one Dushyant Surendra Shukla was examined as witness. In so far as the documentary evidence is concerned, voluminous documents were produced before the trial Court.

10. After having considered the oral evidence adduced by the parties and the documentary evidence produced before the Court, the trial court came to the conclusion that the suit was not time barred. However, it was held that the plaintiff was not able to establish that defendant No.1 had agreed to provide 175 sq.yd. of constructed flat in each flat for the sum of Rs.33,501 per flat on the South Wing and 131 sq.yd. of constructed flat for a sum of Rs.19,001 of the North, East and West Wings, nor it was established by the plaintiff that the constructed area was less or incomplete or defective or substandard materials were used for the purpose of construction. Therefore, it was held that the plaintiff society was not entitled to claim compensation from defendant No.1 for the alleged deficiency in construction. The trial Court had also held that there was no collusion between defendant No.1 and defendant No.5 and, therefore, it was not proved that the certificates issued by defendant No.5 were not valid, legal and binding to the plaintiff. The trial Court had also held that though the defendants had proved their claim of Rs.1,19,251/- as claimed by them in the counter-claim, they are not entitled to recover the same as the counter claim was time barred, resultantly, the trial Court dismissed the suit of the plaintiff and also the counter claim preferred by the defendants. It is these findings of the learned trial Judge which are now challenged and are on the anvil before us in both these appeals, preferred by the plaintiff and defendants respectively.

11. On behalf of the appellant, learned advocate Mr. M.R. Shah, has made his elaborate submission and has also submitted written submissions. On behalf of defendants No.1, 2 and 5, we have heard P.H. Parmar who has also made elaborate submission as well as written submissions.

12. Before examining the contention advanced by the parties, it is pertinent to note certain undisputed facts so far as the present litigation is concerned. It is an admitted fact that the plaintiff society was registered under the provisions of the Gujarat Cooperative Societies Act. Defendant No.1 was a partnership firm and admittedly defendants No.2, 3 and 4 were partners at the relevant time and defendant No.5 was the architect for the construction of flats for the members of the society. Defendant No.1 undertook the construction work of flats as per the agreed terms and conditions. It appears that there was some dispute with regard to the construction of flats which, accordingly to the plaintiff, was not as per the specification and less in area, sub-standard material were used and work remained incomplete. It is also an admitted fact that the possession of the flats was taken over by the plaintiff society on 20.2.1972 but as per the plaintiff, the work was incomplete and, therefore, the plaintiff filed Civil Suit No. 2404 of 1974 before the City Civil Court, Ahmedabad. In the meantime, defendant No.1, by notice dated 15.2.1975 called upon the plaintiff and defendants No.3 and 4 to refer the dispute to arbitrator. As the same was not complied with by the plaintiff and defendant Nos.3 and 4, defendant No.1 partnership firm, had also filed Civil Suit No.2686 of 1975 under Section 20 of the Arbitration Act. The said suit was dismissed by the City Civil Court and the said judgment was carried to the appellate Court by filing First Appeal No.1477 of 1983 and the said appeal is still pending before this Court. In the meantime, summons of the Civil Suit No. 2404 of 1974 filed by the plaintiff was served upon the defendants wherein the defendants again filed application under Section 24 of the Arbitration Act for stay of the proceedings in the suit which was also came to be dismissed by the City Civil Court, Ahmedabad, and the said order of dismissal was carried to the High Court by filing Appeal from Order which also came to be dismissed. Against the said dismissal order, Letters Patent Appeal was also preferred which also came to be dismissed and the review petition against the order on LPA was also was rejected. The matter did not rest there. The said order in LPA was taken to Supreme Court and Special Leave Petition was filed which also came to be dismissed. Thereafter the defendants had filed written statement and counter claim on 6.7.1986 in the Civil Suit No. 2404 of 1974.

13. Seen in the above context, it has become crystal clear that so far as the prayer of the defendants to refer the matter to the arbitrator is concerned, the same was rejected upto the Supreme Court and, therefore, now

there is no question of considering that aspect again in this First Appeal.

14. Now, we may examine whether the suit filed by the plaintiff was rightly dismissed as it was held by the lower court that the plaintiff had not been able to establish their claim. It was the contention of the plaintiff before the lower court that the defendant No.1 had agreed to provide flat admeasuring 175 sq. yd. for a sum of Rs.33,500 in the South Wing and flat admeasuring 131 sq.yd. for Rs.19,001 in the east, west and north wing. In this connection, the trial court had mainly relied on Ex.136, an agreement. On having look at Ex.136, it appears that the agreed price for the construction of A type flat admeasuring 131 sq. yd. was Rs.28,750 while for B type flat admeasuring 175 sq.yd. the price was Rs.37,950. The total price of all the flats was Rs.11,66,100 as per the scheme. The scheme and the Pamphlet thereof was also produced at Ex.157 and 575. In the original scheme, Rs.13,000 was shown as land price and Rs.28,750 towards cost of construction expenses out of which Rs.25,000 were to be paid by way of loan and balance of Rs.16,750 was to be invested by the members. Thereafter the scheme was changed and the measurement was increased from 131 sq. yds. to 175 sq.yds. and, therefore, the prices was also increased and the members were required to pay 32,500 as 40% with loan of Rs.25,000 as 60%. Members were required to pay the membership fee and the share contribution after the society was registered. On having again look at Ex.136, it could be seen that each member was required to pay Rs.28,750 for A type flat and Rs.37,950 for B type flat. It has also come in evidence that the society had directly entered into a 'banakhat' with defendant No.1 and thereafter Exhs.583 and 584 were executed under which they paid Rs.6,66,440. Therefore, in all, the construction charge was Rs.37,950 for 175 sq.yd. flats while for the flat of 131 sq.yd. the price was Rs.28,750. The trial Court has recorded specific evidence on this count and ultimately it was held by the trial Court that the plaintiff had failed to prove that the flats admeasuring 175 sq.yd. were to be provided in consideration of Rs.33,501 while flat admeasuring 131 sq.yd. were to be provided for consideration of Rs.19,001. This finding of the trial Court is just and proper and we confirm the same as the said finding does not require any interference by us.

15. Next it is contended on behalf of the plaintiff that the defendant No.5 in collusion with defendant No.1 had issued false certificates as to the extent, nature of workmanship and quality of the material used for the

construction carried out by defendant No.1. It was alleged that the defendant No.1 in collusion with defendant No.5 collected money from the plaintiff on the basis of the said certificates and, therefore, it was prayed that the said certificates were not binding to the plaintiff. Claim in the suit was for the cost increased for the remaining defective work, particularly for the drainage system of the plaintiff society and the alleged incomplete work. That the defendant No.5 had issued certificates dated 20.2.1975 on which possession was also handed over to the Chairman of the plaintiff society and since then the flats were in possession of the respective members of the society and the incomplete work was also done by the society.

16. The plaintiff placed reliance on Ex. 140 which, inter alia, revealed the pending work as under:

1. Parking pillar plaster
2. Skirting in north wing 7th floor
3. Tiles in balcony of third floor west wing
4. Tiles for lift cills
5. Remaining glass of windows
6. Final coat of oil paints
7. Peeping glass in main doors
8. Electric bulbs and water taps
9. Miscellaneous Plaster touching
10. Final coat of white wash in two rooms of second floor west wing, two rooms in 5th floor, south wing and ground floor east wing.
11. Rebuilt of water closet for 2nd floor east wing and third floor west wing.

Therefore, it was contended by the plaintiff that the amount spent on the aforesaid items shall have to be deducted. After the letter Ex.140 written by the plaintiff to the defendant No.1, defendant No.1 replied on 5.9.1972. The said letter, inter alia, revealed that electric bulbs at Rs.22.50 per doz. (2) pending glass for the main door at the rate of Rs.5.50 per piece, (3) skirting work at the north wing, 7th floor being incomplete being skirting not in stock at the 5th floor and (4) the owner had to carry out some work in two rooms, the white wash was not carried out. Therefore, defendant requested that the price of said four items be deducted from the balance of Rs.5000 and balance be paid. The aforesaid letter was not replied by the plaintiff nor the contents thereof were disputed. Therefore, it could be assumed that out of 11 items mentioned in Ex.140, only seven items have been completed and for the reasons assigned in the letter at Ex.526 defendant No.1 had

requested the plaintiff to carry the remaining work and the cost be deducted from Rs.5,000 and the remaining amount be paid. It was also contended that the plaintiff society had incurred expenditure of Rs.40,000 for removing defects in drainage and water lines. To prove this incomplete work reliance was also placed on the photographs though photographs were not exhibited initially. However, to prove the photographs the plaintiff had examined one of the witness Piyushkumar Chandulal, P.W.21 and Rameshbhai Trambaklal Dave, P.W.22, Exhs.342 and 346 respectively.

17. On having look at the photographs it could be spelled out that the work was incomplete. There appeared some patches on the wall but it was not proved as to at what point of time these photographs were taken. Therefore, photographs were not relied upon by the lower court. On overall oral testimony of P.W.2 to P.W.22 on behalf of plaintiff it could be seen that certain work were carried out and the plaintiff had paid for the same. According to the plaintiff the work carried out by P.W.2 to P.W.22 was on behalf of defendant No.2 who had kept the work under contract, incomplete or defective. The trial court has recorded the finding that no work was carried out by P.W.2 to P.W.22, which were the incomplete or defective work carried out by defendant No.1, and, therefore, no work had remained incomplete except that four items as referred to in Ex.526. Upendra Ambalal Shah, P.W.2, had agreed that he had not carried out any work in the premises. Therefore, there was no question of constructing any cupboard for electric meters as it was not as per the contract requirement to be fulfilled. It appears from the evidence of the witnesses that the work which was carried out was the personal work of the members concerned and it had nothing to do either with the society of with defendant No.1. Therefore, the plaintiff had miserably failed to prove that the flat constructed by defendant No.1 for the plaintiff society was less in area or defective or incomplete or substandard quality building materials were used by defendant No.1.

18. Now that takes us to the last contention of the plaintiff that defendant No.5 in collusion with defendant No.1 has issued false certificates. The trial court had discussed at length that the defendant No.5 who happened to be the son of defendant No.1 was appointed as an architect of defendant No.1 and that fact was within the knowledge of the plaintiff society and there is no evidence to the effect that defendant No.5 had issued false certificates. As we have discussed at length while

deciding the question of alleged construction less in area, or defective or incomplete work or use of sub-standard material in construction, we need not reiterate the same. Therefore, the plaintiff has also failed to establish that defendant No. 5 had issued false certificates in collusion with defendant No.1.

19. In view of the aforesaid discussion, we are of the opinion that the plaintiff had failed to establish the claim made by it and, therefore, the impugned judgment and decree of the trial court does not require any interference and on the contrary it requires affirmation. We are also of the opinion that the plaintiff was not entitled to claim compensation as averred by it from the defendant No.1. Therefore, the First Appeal No 952 of 1986 filed by the plaintiff is required to be dismissed.

20. Now, after having held that the appeal filed by the plaintiff is required to be dismissed, we have to consider the appeal filed by the defendants No.1 and 2 against the dismissal of the counter claim preferred by them.

21. It is contended by the appellants/ original defendants in First Appeal No. 1359 of 1986 that after having held that the counter claim is proved by the defendants, the trial court has committed grave error in dismissing the counter claim filed by the defendants on the ground of limitation. The trial court has not considered the law of limitation in its proper perspective. The trial Court ought to have considered the limitation from the date of dismissal of the prayer for appointment of arbitrator and not from the date of handing over of the possession of the flats. The sum and substance of their submission centres round the commencement of the limitation in preferring the counter claim. According to the defendants the limitation period started from the date of the rejection of the prayer for appointment of arbitrator and not from the date of handing over possession of flats. As against that the respondent/plaintiff supported the judgment of the trial court and submitted that the period of limitation started from 20.4.1972, that is, the date on which the possession of flats was handed over and also by adding two months notice period. Therefore, the trial court has rightly rejected the counter claim on the ground of limitation. It is further submitted by them that the trial court has wrongly held that though the defendants had proved the counter claim they are not entitled to recover the said amount as the claim is time barred.

22. In view of the rival submissions, now we have to consider firstly whether the counter claim preferred by the defendants was within the time, that is, within the prescribed period of limitation or not? To answer this question, let us have some background of the starting point of litigation.

23. The dispute arose between the parties regarding defective work. However, possession was handed over to the society by the defendants on 20.2.1972 and thereafter the society had filed civil suit No.2404 of 1974 before the City Civil Court, Ahmedabad, against the defendants. Pursuant to the notice of motion, the defendant No.1 by its notice dated 15.2.1975 called upon the plaintiff and defendants No.3 and 4 to refer the dispute to the arbitrator. As the same was not complied with by the plaintiff and the defendants No.3 and 4, defendant No.1 was obliged to file Civil Suit No.3686 of 1975 under the provisions of Section 20 of the Arbitration Act. The said suit was dismissed and the matter was taken to the High Court by way of First Appeal No.1477 of 1983, which is still pending. After the summons in Civil Suit No.2404 of 1974 filed by the society was served on the defendants, again the defendant No.1 filed an application in that suit vide Ex.16 to pass appropriate order for staying of the suit under Section 34 of the Arbitration Act. The said application was also dismissed by the City Civil Court, Ahmedabad. The said order was also brought in challenge before this Court by way of an Appeal from Order which was also dismissed. Against the order of dismissal of Appeal from Order, Letters Patent Appeal was also preferred which also came to be dismissed and against the said order, review petition was filed which also came to be dismissed. Against that, for preferring Special Leave Petition before the Supreme Court, leave was sought for and ultimately, the matter was taken to the Apex Court which also came to be dismissed. Therefore, the defendants had not filed written statement till 5.7.1984 and, therefore, the counter claim came to be filed on 6.7.1984 by the defendant No.1.

24. Keeping in forefront the aforesaid aspects now let us examine whether the finding arrived at by the trial court on the point of limitation requires our interference? It was contended before the lower court and before us also that the time spent from 1974 to 1984 for invoking provisions of Arbitration Act was required to be excluded under Section 14 of the Limitation Act as it was spent for prosecuting proceedings in Courts and secondly the claim was acknowledged by part payment. To

meet with the aforesaid submission, let us examine the statutory provision of Section 14 (1) of the Limitation Act, which reads as under:

> "14. Exclusion of time of proceeding bona fide in court without jurisdiction: (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

25. Now, in view of the aforesaid statutory provision, the question would be whether the proceedings in the present suit were proceedings also in issue in the alleged proceedings in a suit under Section 20 of the Arbitration Act. There is no dispute that the proceedings in the suit relates to the same matter in issue as proceedings in that suit under Section 20 of the Arbitration Act. Therefore, it can be said that the defendants No.1 and 2 have prosecuted another civil proceedings under Section 20 of the Arbitration Act. Now again another question which arises for consideration is as to whether the proceeding initiated by defendants No.1 and 2 under Section 20 of the Arbitration Act was within the period of limitation or not? Section 20 of the Arbitration Act contemplates for an application to file arbitration agreement in Court and the such application is required to be filed under Article 181 of the Limitation Act,1908 which was a residuary clause there. It was not incumbent upon them to wait till the suit is filed under Section 34 of the Arbitration Act. Defendants No.1 and 2 could have also filed separate suit for the amount which they have claimed by way of counter claim and could have prosecuted remedies under Section 34 of the Arbitration Act. It is the choice of the parties to decide as to whether counter claim should be filed or separate suit should be preferred. If the claim was likely to become barred by limitation the defendants ought not to have waited till disposal of the application under Section 34 of the Arbitration Act. In these circumstances, the defendants will not be entitled to the exclusion of the time spent for prosecuting application under Section 34. So far as Section 20 of the Limitation Act, 1963 is concerned, there is a specific provision for

filing of application for appointment of arbitrator and it would be governed by the residuary clause under Article 113 of the Arbitration Act, which reads as under:

"113. Any suit for which no period of limitation is provided elsewhere in this Schedule period of limitation is three years and the time begins to run when the right to sue accrues."

26. There cannot be two opinion that the counter claim, for all purposes, is as good as suit and such a right is given to the defendants under Rule 6 (A) of the Order VIII of the Civil Procedure Code, 1908 which reads as under:

"6A. (1) A defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not;

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

Therefore, under Rule 6A, the defendants could in addition to their right of pleading to set off may set up by way of counter claim against the claim of the plaintiff but such right or claim must be a legal right and must be a legally recoverable one. Therefore, the

claim which was time barred by limitation was not legally recoverable and hence the defendants were not required to wait till the filing of suit by the plaintiff. It was incumbent upon the defendants that irrespective of the plaintiff's suit they could have filed the suit for the dues. In these circumstances, we are unable to persuade ourselves to agree with the contentions of the defendants that the time spent for the prosecuting remedies under the Arbitration Act may be excluded from counting the period of limitation for filing the counter claim. Therefore, it was rightly held by the trial court that the counter claim preferred by the defendants was time barred.

27. The next question which requires our consideration is as to at which point the limitation should commence for the purpose of considering the limitation of the counter claim. In this regard, the trial court has observed that the defendants were required to carry out work for and on behalf of the plaintiff and the plaintiff went on paying for the same. According to the defendants, work was completed somewhere in February 1972 and that possession was handed over to the society. Defendant No.5 had issued certificates on the same day to the plaintiff society certifying that the flats were ready in all respects for occupation and the same to be occupied with immediate effect. As some minor work was pending, Rs.5000 was retained. The trial court has observed that the cause of action was started from 20.2.1972 and adding two months' time for the statutory notice period, the period to make counter claim had expired in any case on or after 20.4.1975. The sum and substance of the aforesaid discussion would be that by no stretch of imagination it can be said that the counter claim preferred in 1984 in the suit filed by the plaintiff in the year 1974 can be said to be within the period of limitation and we affirm the finding of the trial court by holding that the counter claim preferred by the defendants was time barred.

28. After having held that the counter claim preferred by the defendants was time barred, now we have to consider whether the defendants had proved their claim and whether they were entitled to Rs.1,86,031 for the extra work which they have carried out which was not as per the terms and conditions of the agreement. This question was dealt with by the trial court at length. After considering the evidence adduced before it, the trial court came to the conclusion that the defendants had successfully proved that the amount spent for the work which they had carried out, not as per the terms and

conditions of the agreement and, therefore, they are entitled to the said amount of Rs.1,19,251 towards the balance value of the flat and Rs.21,000 being the value of the extra work and, therefore, in all the defendants were entitled to Rs.1,40,251. But as the claim was time barred, the defendants were not entitled to recover the said amount .

29. After having examined the judgment impugned and the evidence on record, we do not deem it expedient to examine the said part of the evidence when we are fully in agreement with the observations and findings arrived at by the trial court in this regard. In this connection, we press into service the judgment of the Apex Court in the case of Girijanandini Devi v. Bijendra Narain Choudhary, reported in AIR 1967 SC 1124 wherein the Supreme Court has held that when the appellate Court agrees with the view of the trial Court on evidence it need not restate effect of evidence or reiterate reasons given by the trial Court. The expression of general agreement with reasons given by Court decision of which is under appeal would ordinarily suffice. In view of the aforesaid factual situation and the case law propounded by the Apex Court, when the appellate court is broadly in agreement with the the finding arrived at by the trial court, the expression 'broadly in agreement' with the finding, is sufficient and appellate court is not required to examine the evidence at length. In the instance case, we are fully in agreement with the finding arrived at by the trial court and, therefore, we do not propose to disturb the finding. We also hold that the appellants/defendants have proved their claim to the extent of Rs.1,40,251 and they would have been entitled to the said amount but as the counter claim was time barred they were not entitled to recover the amount. Therefore, we do not deem it necessary to discuss the point in greater details.

30. In view of the foregoing observations and discussions, the First Appeal No. 1359 of 1986 preferred by the defendants challenging the judgment and decree dismissing of counter claim requires to be dismissed as it does not require our interference.

31. In the premise, both the appeals are found meritless and, therefore, they are dismissed. No order as costs.

32. No order on the civil application.